No. 10,943

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

San Mateo Feed & Fuel Company (a corporation), and H. E. Casey Company (a copartnership),

Appellants,

vs.

G. S. Hayward, as Trustee in the Matter of Joseph Louis Scardino, Bankrupt,

Appellee.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

STATEMENT OF JURISDICTION.

The appellee petitioned the bankruptcy court for a turnover order against the appellant. (T. 16-18.) An order to show cause was issued by the Referee (T. 19-20), and each appellant appeared and answered to the merits (T. 20-26). Following the hearing, findings of fact, conclusions of law, and a turnover order were made and entered by the Referee. (T. 235-239.) Both appellants petitioned for review. (T. 226-230, 239-244.) Jurisdiction of the District Court is therefore sustained by section 2, subdivision a (10) (15), and sec-

tion 39, subdivision (c) of the Bankruptcy Act. (11 U.S.C.A., sec. 11, subd. a; 11 U.S.C.A., sec. 67, subd. (c).)

An order of the District Court was made and entered on October 13, 1944, approving and confirming the proceedings and findings of the Referee and affirming and adopting the order of the Referee. (T. 250-251.) Notice of appeal therefrom to this court was filed by the appellants on November 10, 1944. (T. 251-252.) Jurisdiction of this court upon appeal to review the said order of the District Court is therefore sustained by section 24, subdivisions a and b, of the Bankruptcy Act. (11 U.S.C.A., sec. 47, subds. a and b.)

STATEMENT OF THE CASE.

The appellee is trustee in bankruptcy of the estate of Joseph Louis Scardino (T. 29) who was adjudged a bankrupt on April 30, 1942 (T. 2-3). She invoked the summary jurisdiction of the bankruptcy court by certified petition for a turnover order against appellants on the ground that they had received voidable preferences. (T. 16-18.) In response to an order to show cause issued by the Referee on April 2, 1943 (T. 19-20) the appellants appeared and answered to the merits (T. 20-26).

Hearings were had on the petition commencing April 12, 1943 (T. 64), and on September 15, 1943, the Referee made an order dismissing the petition because he was of the opinion that the trustee had not estab-

lished the element of insolvency (T. 26-27). A petition for review was filed by the trustee in which she offered to prove all the elements essential to avoidable preference, including the element of insolvency. (T. 4-9.) An affidavit of the bankrupt in support of the offer of proof was made a part of the petition for review. (T. 8, 10-14.) After considering the petition and affidavit, the Referee recommended and requested that the record be remanded "with instructions to take such further proceedings as are warranted in the premises". (T. 14-15.) An order of the District Court was made on October 4, 1943, remanding the record to the Referee "for further proceedings in accordance with his request". (T. 57-58.) No appeal was taken from this order.

Commencing on November 22, 1943, "further hearing" on the petition for turnover order was had. (T. 143.) At no time did the appellants object to the sufficiency of the petition or the scope of the issues. The evidence before the Referee was conflicting. He was called upon to judge of the credibility of witnesses whose testimony he heard. It is enough to say at this point, however, that the evidence before the Referee was sufficient to establish all the elements of voidable preference as defined in section 60, subdivisions (a) and (b), of the Bankruptcy Act. (11 U.S.C.A., sec. 96, subds. (a) (b).) The pertinent parts thereof read:

> "(a) A preference is a transfer, as defined in this title, of any of the property of a debtor to or for the benefit of a creditor for or on account of an antecedent debt, made or suffered by such

> debtor while insolvent, and within four months before the filing by . . . him of the petition in bankruptcy . . . the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class. * * *
>
> (b) Any such preference may be avoided by the trustee if the cdeditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent.''

On December 27, 1943, the Referee made his findings of fact and conclusions of law, and entered a turnover order against both appellants. (T. 235-239.) Each appellant duly petitioned for review. (T. 226-230, 239-244.) The order of the District Court approving and confirming the proceedings and findings of the Referee, and affirming and adopting the turnover order, was made on October 13, 1944.

Comment is necessary on the form of appellants' opening brief. It contains no specification of errors as required by Rule 20, subdivision 2 (d) of this Court. Appellants merely present ''points'' as they stated them in their ''Concise Statement'' under Rule 19, subdivision 6. None of the ''points'' made by appellants comply with said Rule 20 concerning the specification of error, nor is urged error separately and particularly set out, although litigants and their counsel have been admonished the said Rule 20 must be strictly observed. (*Chapman Bros. Co. v. Security*

First Nat. Bank, 9 Cir., 111 F. 2d 86, 87; *Sampsell v. Anches,* 9 Cir., 108 F. 2d 945, 948.)

Again, in "Point 2" both appellants jointly attack the Referee's findings numbered (3), (4), (6), (8), (10), (11), and (13). (App. Op. Bf. 11.) Both jointly challenged such findings in their "Concise Statement" filed under Rule 19, subdivision 6, of this court. (T. 262.) But findings numbered (6), (8), (10), and (13) have reference solely to the appellant San Mateo Feed & Fuel Company. (T. 236-238.) Obviously, the appellant H. E. Casey Company has no concern with such findings. Corresponding findings numbered (5), (7), (9), and (12), applicable solely to the appellant H. E. Casey Company (T. 236-238), have not been attacked in the brief, and were not challenged in the said "Concise Statement" (T. 262).

ARGUMENT OF THE CASE.

Summary of Argument.

1. The sufficiency of the petition for the turnover order is moot. Its scope was enlarged by the order of the District Court on October 4, 1943. Appellants did not object to the sufficiency of the petition or the scope of the issues before the Referee. No defect in form affected the substantial rights of the appellants.

2. The substantial rights of the appellants were not affected by any ruling of the Referee respecting the records of the bankruptcy proceeding. Appellants have not affirmatively shown error, for the evidence

which they say the Referee improperly received and considered is not contained in the record on appeal. Appellants did not object to the Referee considering the bankrupt's schedule and affidavit. On the contrary, they affirmatively consented to their consideration.

3. The evidence in the record is sufficient to support the findings and turnover order of the Referee. It satisfies all the elements essential to avoidable preference, for it establishes: (a) A transfer of property of the debtor to the appellant creditors for or on account of an antecedent debt, (b) while the debtor was insolvent, (c) within four months before the filing of the petition in bankruptcy, (d) enabling the appellant creditors to obtain a greater percentage of their debts than some other creditor of the same class, (e) and made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

4. The turnover order made by the Referee was sound in law and sound in fact, and was properly affirmed and adopted by the District Court. Therefore the order of the District Court should be affirmed by this court.

---

1. THE SUFFICIENCY OF THE PETITION FOR THE TURNOVER ORDER IS MOOT.

In Point 3 of their brief the appellants contend that the trustee's petition for a turnover order does not state facts sufficient to warrant the relief granted by the Referee and affirmed and adopted by the District Court. (App. Op. Bf. 10.)

The contention is moot for at least three reasons. The first reason is that the scope of the petition was enlarged by the order of the District Court made on October 4, 1943. (T. 57-58.) That order was made pursuant to a petition for review filed by the trustee when she was confronted by an adverse ruling of the Referee that she had not proved insolvency of the debtor at the time of transfer. In her petition for review the trustee offered to prove:

> "1. That within four months of the filing of Bankrupt's petition herein, and more particularly between December 30, 1941, and the date upon which he filed said petition, April 29, 1942, and upon each and every intervening day, the aggregate of all Bankrupt's property, exclusive of the total sums conveyed by him to the Respondents herein, was not, at a fair valuation thereof, sufficient to pay his debts.
>
> "2. That Respondents actually knew Bankrupt's financial condition was such that in January, 1942, he was compelled to and did close his business and had no money or property with which to pay all of his outstanding debts; that this condition existed not only at the time of the closing of the same, but also continually for more than one month prior thereto and continually thereafter up to and including April 29, 1942.
>
> "3. That Respondents had reasonable cause to believe Bankrupt was insolvent within the meaning of the Bankruptcy Act, at the times they received such payments.
>
> "4. That by the very manner in which Respondents obtained the preferential payments, and their activities leading up to their acquiring said

payments, Respondents knew they were obtaining preferences." (T. 7-8.)

This offer of proof was supported by the affidavit of the bankrupt particularizing the facts. (T. 10-14.) On consideration thereof, the Referee recommended that the records be remanded "with instructions to take such further proceedings as are warranted in the premises". (T. 14-15.) The order of the District Court on October 4, 1943, remanded the records to the Referee "for further proceedings, in accordance with his request". (T. 57-58.) No appeal from the order of the District Court was taken by the appellants herein, although such order was reviewable by appeal to this court under section 24, subdivision a, of the Bankrupty Act. (11 U.S.C.A., sec. 47, subd. a.) Whatever the original scope of the petition for turnover order may have been, it is obvious that it was enlarged by the order of the District Court to permit proof of the elements which appellants assert were lacking from the petition as filed.

The second reason why the contention is moot, is that the sufficiency of the petition was in no way challenged in the proceedings before the Referee. Nor was any objection made by appellants to the scope of the issues before the Referee. On the contrary, appellants vigorously contested all issues on the merits. Under such circumstances their belated attack upon the sufficiency of the petition is moot. The case of *In Re Kantor's Delicatessen,* 34 F. Supp. 899, is decisive on the subject. It is there said, at page 902:

"On behalf of the landlord, the petitioner, however, it is contended that the proofs of conspiracy, taken before the Referee, were not within the issues framed by the pleadings.

The record, however, does not show that any objections were made by the counsel for the petitioning landlord to the receipt of proof offered to show the conspiracy, on the ground that it was not within the issues framed by the pleadings. On the contrary, they vigorously contested the issue of conspiracy on the merits.

Rule 15, subdivision (b), of the Federal Rules of Civil Procedure, 28 U.S.C.A. following section 723c, provides as follows:

'(b) Amendments to Conform to the Evidence. When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment to the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of the trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues made by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the admission of such evidence would prejudice him in maintaining his action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.'

> The Rules of Federal Civil Procedure apply to Bankruptcy cases, General Order No. 37, 11 U.S.C.A. following section 53 in effect February 13, 1939. In Re Harbor Stores Corp., D.C. 33 F. Supp. 360; Kroell v. New York Ambassador, Inc., 2 Cir., 108 F. 2d 294.
>
> The sole question is: Was 'implied consent' given?
>
> From the record, it appears to me that such was the case. * * *
>
> The Federal Rules of Civil Procedure do not speak of causes of action, but of claims and claims to relief, and the Trustee should be denied relief only when, under the facts proved, he is entitled to none. Nester v. Western Union Telegraph Co., D.C., 25 F. Supp. 478, at page 481.
>
> It is true that no amendment was ever made to conform the pleadings to the proof, but under Rule 15 (b) of the Federal Rules of Civil Procedure, that would not deprive the Trustee of the right to recover, because if this Court, or even the Appellate Court, should consider it necessary, they would have the right to allow such amendment. Swift & Co. v. Young, 4 Cir., 107 F. 2d 170, at page 172; In Re Cleveland Discount Co., D.C., 5 F. 2d 846."

The third reason is that appellants make no attempt at showing in their brief that any defect in the petition affected their substantial rights. Reference may be made to Rule 61, of the Federal Rules of Civil Procedure (28 U.S.C.A. following sec. 723c), which provides:

"No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court in every stage of the proceedings must disregard any error or defect in the proceedings which does not affect the substantial rights of the parties."

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2. THE SUBSTANTIAL RIGHTS OF THE APPELLANTS WERE NOT AFFECTED BY ANY RULING OF THE REFEREE RESPECTING THE RECORDS OF THE BANKRUPTCY PROCEEDING.

Appellants' Point 4 is that the "referee improperly received and considered in evidence . . . all the records of the bankruptcy proceeding, including the bankrupt's schedule and . . . ex parte affidavit. (App. Op. Bf. p. 11.)

The "point" is prefaced with the alien statement that the Referee "arbitrarily" *declined* to receive and consider evidence as to "course of business dealings". (Ap. Op. Bf. 11.) No "point" of that character is suggested in the "Concise Statement of Points to be Relied Upon by Appellants on Appeal" filed by appellants under Rule 19, subdivision 6, of this court. (T. 261-264.) Reply to the alien statement is therefore unnecessary.

The balance of the "point" consists in a quotation from Remington on Bankruptcy, 4th ed., sec. 2260, to the effect that "the schedules of the bankrupt are inadmissible against a transferee", and the quotation from a case there cited in support of the text. (Ap. Op. Bf. 12.) The concluding sentence of Remington's said section 2260 is omitted by appellants. It reads:

> "But due objection to their admission must be made at the time, else the objection is waived."

And the said concluding sentence is fully supported by the case there cited, to-wit, *Osley v. Adams,* 5 Cir., 268 F. 114, 116.

The manner in which appellants present their said Point 4 demonstrates the advisability of requiring strict observance of Rule 20, subdivision 2 (d), of this court, concerning specification of error. Observance of that Rule would have required appellants to "quote the grounds urged at the trial for the objection and the full substance of the evidence admitted". The bankrupt's schedule is not contained in the record on appeal. On such state of the record an affirmative showing of error cannot possibly be made by the appellants. Moreover, when reference is made to the record it will be found that neither the bankrupt's schedule nor his *ex parte* affidavit were admitted in evidence. It will also be found that appellants not only failed to object to their consideration by the Referee, but they affirmatively consented to their consideration. The record is quoted:

> "Mr. Margolis. * * * We, therefore, ask at this time, if it please your Honor, that the petition

and schedules be introduced in evidence and marked as a portion of the record, by designating it Trustee's Exhibit 'A'.

The Referee. They are part of the record anyway.

Mr. Margolis. Yes, but I would like to offer them in evidence, your Honor.

The Referee. You don't have to do it. Under the Federal rule, they are before the Court and the Court will take into consideration everything in the record.

Mr. Margolis. Very well." (T. 144.)

"The Referee. He would have to show he had other creditors or it could not be a voidable preference if they did receive it.

Mr. Hoffman. The schedules speak for that.

The Referee. Are you willing to rest on the schedules? You are not objecting to them?

Mr. Hoffman. The only thing I am objecting to on the schedules is, we are not named." (T. 169.)

"Mr. Margolis. Mr. Hoffman, your Honor, stated a moment ago that his client is not named in the schedule.

Mr. Hoffman. I was kidding.

Mr. Margolis. Maybe I misunderstood. You asked a question, whether they had an objection to the schedules. We offered them before; your Honor said it was not necessary.

The Referee. They are before the Court." (T. 169.)

"Mr. Margolis. I think counsel has in mind that it is set out by affiant in the affidavit that the only property he had was $50 at the time he filed, which was subject to attachment.

The Referee. That is not disputed. But, anything so far as the affidavit stands." (T. 179.)

"Q. You (Scardino) have listed in your schedules, certain wage claims, certain people you owe money for wages. Is that correct?

A. Well, it was the men working for me.

Q. That is right. The workmen?

A. Yes." (T. 160.)

Finally, the bankrupt was fully examined and cross-examined respecting his schedules and affidavit, and the turnover order may be supported by that testimony. It therefore follows that even if it be assumed that the Referee should not have "considered" the schedules and affidavit, it cannot be said that any substantial rights of the appellants were thereby affected.

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3. THE EVIDENCE IN THE RECORD IS SUFFICENT TO SUPPORT THE FINDINGS AND TURNOVER ORDER OF THE REFEREE.

Rule 52, subdivision (a), of the Federal Rules of Civil Procedure (28 U.S.C.A. fol. sec. 723c) provides:

"Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses."

In *Wittmayer v. United States,* 9 Cir., 118 F. 2d 808, it was said, at page 811:

"The findings of the trial Court fall within the familiar rule, that where based upon conflicting evidence they are presumptively correct, and un-

less some obvious error of law, or mistake of fact, has intervened, they will be permitted to stand. Silver King Coalition Mines Co. v. Silver King C. M. Co., 8 Cir., 204 F. 166, 177.

The provisions of the new procedural rules that the findings of fact of the trial judge are to be accepted on appeal unless clearly wrong (Rule 52(a), 28 U.S.C.A. following section 723c), is but the formulation of a rule long recognized and applied by courts of equity. Guilford Const. Co. v. Biggs, 4 Cir., 102 F. 2d 46, 47.

As was said by Mr. Justice Holmes in Adamson v. Gilliland, 242 U.S. 350, 353, 37 S.Ct. 169, 170, 61 L.Ed. 356 (citing Davis v. Schwartz, 155 U.S. 631, 636, 15 S.Ct. 237, 39 L.Ed. 289), the case is pre-eminently one for the application of the practical rule, that so far as the findings of the trial judge who saw the witnesses 'depends upon conflicting testimony or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.' "

And in *In Re Magnet Oil Co.,* 9 Cir., 119 F. 2d 260, it was said, at pages 261 and 262:

(261) "The referee found it was not true that the notes were to be paid out of a sale of Magnet's stock. The District Judge (262) approved the finding and adopted it as his own. The finding is amply supported by evidence. We accept it, therefore, and reject appellant's contention that the obligation evidenced by the notes was a conditional one."

Tested by the foregoing rules, the record discloses ample evidence to support each element of voidable preference and the findings to that effect made by the Referee as against each appellant.

(a) A transfer was made of property of the debtor to each appellant creditor for or on account of the antecedent debt.

The bankrupt was a plastering contractor. He did work for several general contractors, including Conway & Culligan. He bought materials from the appellants on open account. (T. 45, 119.) He went out of business around the middle of February, 1942 (T. 152), and filed his petition in bankruptcy on April 29, 1942 (T. 2).

At the time the bankrupt went out of business he was indebted to the appellant H. E. Casey Company in the sum of $4308.73 on open account. (T. 42.) On January 15, 1942, he had made assignments to said appellant of moneys coming to him from one Schmidt, and on January 20, 1942, said appellant collected from said Schmidt the respective sums of $232.23 and $246.50. (T. 36-39.) On February 18, 1942, the bankrupt assigned to said appellant the sum of $2035.89 coming to the bankrupt from Conway & Culligan. (T. 31-32.) On February 20, 1942, the bankrupt assigned to both appellants monies due him from Conway & Culligan, and the assignment was accepted by Conway & Culligan. (T. 48-49.) Between February 24, 1942, and April 27, 1942, appellant H. E. Casey Company collected from Conway & Culligan by virtue of either or both of said assignments the said sum of $2035.89 and applied it on the indebtedness of the bankrupt.

(T. 97.) An indebtedness of $1031.52 on the open book account remained in favor of said appellant. (T. 24.) No creditor's claim was filed by said appellant in the bankruptcy proceeding. (T. 250.)

At the time the bankrupt went out of business in February, 1942, he was indebted to appellant San Mateo Feed & Fuel Company in the sum of $1838.26 on an open account. (T. 122.) Between December 30, 1941, and February 10, 1942, the said appellant had collected from debtors of the bankrupt the sum of $424.12 and applied it on the indebtedness of the bankrupt. (T. 121.) Between February 19, 1942, and March 12, 1942, the said appellant collected from debtors of the bankrupt the sum of $621.23, and applied it on the indebtedness of the bankrupt. (T. 121.) The total thus collected was the sum of $1025.35. An indebtedness of $1009.11 remained on the open book account in favor of said appellant. (T. 122.) No creditor's claim was filed by said appellant in the bankruptcy proceeding. (T. 250.)

In *Grandison v. National Bank of Commerce,* 2 Cir., 231 F. 800, it was said, at pages 803 and 804:

> "That a 'transfer' of the property of the debtor was made is certain. That several transfers were made to Alexander and through him to defendant, is not denied. It is not essential that the transfers should have been made directly to defendant. Any method of depleting an insolvent fund is sufficient. See Remington on Bankruptcy, sec. 1300. As stated in National Bank of Newport v. National Herkimer County Bank, 225 U.S. 178, 184, 32 S.Ct. 633, 635, 56 L.Ed. 1042 (1912):

'To constitute a preference, it is not necessary that the transfer be made directly to the creditor. It may be made to another, for his benefit. If the bankrupt has made a transfer of his property, the effect of which is to enable one of his creditors to obtain a greater percentage of his debt than another creditor of the same class, circuity of arrangement will not avail to save it.'

And, in the same case the court, speaking through Mr. Justice Hughes, said:

'The "accounts receivable" of the debtor, that is, the amounts owing to him on open account—are, of course, as susceptible of preferential disposition as any other property; and if an insolvent debtor arranges to pay a favored creditor through the disposition of such an account, to the depletion of his estate, it must be regarded as equally a preference, whether he procures the payment to be made on his behalf by the debtor in the account, the same to constitute a payment in whole or part of the latter's debt, or he collects the amount and pays it over to his creditor directly. This implies that, in the former case (804) the debtor in the account, for the purpose of the preferential payment is acting as the representative of the insolvent, and is simply complying with the direction of the latter in paying the money to his creditor.' "

(b) The transfer was made while the debtor was insolvent.

The Referee made the following findings:

"(5) At the time of the making of said assignment by the bankrupt to said H. E. Casey Company, said bankrupt was insolvent, and, at said

time, said H. E. Casey Company had reasonable cause to believe that said bankrupt was insolvent;

(6) At the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., said bankrupt was insolvent, and, at said time, said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent; . . ." (T. 236-237.)

As earlier mentioned, in Point 2 the appellants *jointly* challenge the sufficiency of the evidence to support above quoted finding No. (6). (App. Op. Bf. p. 6.) Of course the appellant H. E. Casey Company can have no concern with quoted finding No. (6) which is applicable only to its co-appellant. Neither appellant challenged the sufficiency of the evidence to support above quoted finding No. (5). Their *joint* "Concise Statement of Points to be Relied upon by Appellants on Appeal", filed under Rule 19, subdivision 6, of this court, has no reference to said finding No. (5). (T. 261-265.) Under such circumstances it may be doubted that the appellant H. E. Casey Company has any standing in court to question the sufficiency of the evidence to support the finding of transfer while insolvent.

However, there is ample evidence in the record to support a finding as to each appellant that transfer was made while the debtor was insolvent. The bankrupt testified as follows:

"Q. Now at the time you made these payments to San Mateo Feed & Fuel Company and to H. E. Casey & Company, was the value of all the prop-

erty you had sufficient, at its fair market value, to pay all the debts that you had?

A. No, sir." (T. 148.)

"Q. Now, on any of the dates during the period between December 29, 1941, and April 29, 1942, was the sum total of all the property you had, exclusive of the payments which were made to Casey & Company and San Mateo Feed & Fuel, sufficient to pay all of your then liabilities?

A. No, sir." (T. 150.)

This testimony plainly measurs up to the definition of "insolvent" contained in section 1 (15) of the Bankruptcy Act. (11 U.S.C.A., sec. 1 (15).)

(c) The transfer was made within four months before the filing of the petition in bankruptcy.

Both appellants contend that Referee's finding No. (4) is not supported by the evidence. (App. Op. Bf. 6.) In the part pertinent to the discussion, it reads (T. 246):

"(4) Said assignments were, and each of them was, made by said bankrupt to the respective assignees within four months of the filing of the bankrupt's petition to be adjudicated a bankrupt."

That the petition in bankruptcy was filed on April 29, 1942, is not open to question. (T. 2.) It was admitted by the respective answers made by the appellants to the trustee's petition for turnover order. (T. 20, 23.)

In an earlier part of this brief it was shown that transfers were made to appellant H. E. Casey Company between January 20, 1942, and February 20, 1942, and that transfers were made to appellant San Mateo Feed & Fuel Company between December 30, 1941, and March 12, 1942. Simple computation therefore demonstrates that the transfers were made within four months before the filing of the petition in bankruptcy.

(d) The effect of the transfer was to enable the appellants to obtain a greater percentage of their debts than some other creditor of the same class.

The Referee made these findings (T. 237):

"(7) When said assignment was made to said H. E. Casey Company the estate of said bankrupt was, and still is, depleted to the extent of $2,534.76;

(8) When said assignment was made to said San Mateo Feed and Fuel Co., the estate of said bankrupt was, and still is, depleted to the further extent of $1,025.35;

(9) By said assignment by said bankrupt to said H. E. Casey Company said last mentioned company secured an undue advantage over other creditors of the same class who, like said last mentioned company and said San Mateo Feed and Fuel Co. were, and are, unsecured creditors of said bankrupt;

(10) By said assignment by said bankrupt to said San Mateo Feed and Fuel Company, said last mentioned company secured an undue advantage over other creditors of the same class who, like said H. E. Casey Company were, and now are, unsecured creditors of said bankrupt; . . ."

The appellants *jointly* challenge quoted findings Nos. (8) and (10). (App. Op. Bf. p. 6.) Neither appellant challenges quoted findings Nos. (7) and (9). (T. 262.)

In their statement of Point 7 the appellants say that the evidence was insufficient to support a finding that they were unsecured creditors or secured an undue advantage over other creditors of the same class. (App. Op. Bf. p. 18.)

No argument is made or authority cited under the "point" to support a contention that they were secured creditors. Had such contention been made a complete answer thereto would be found in the cases of *Mallot & Peterson v. Street,* 9 Cir., 4 F. 2d 770, and *De Forest v. Crane & Ordway Co.,* 179 Pac. 291, 293-4.

Nor is any argument made or authority cited under the "point" to support a contention that there were not other creditors of the same unsecured class over whom appellants secured an advantage. Elsewhere in the brief, however, and under Point 8, the appellants assert that there was no evidence, apart from the bankruptcy schedule, showing the existence of such other creditors. Appellants are mistaken. The bankrupt gave this testimony:

> "Q. The claims you set forth, the unsecured: State Compensation Ins. Fund; Industrial Indemnity Co., two items here; Blake-Moffit-Towne Paper Co.; Markus Cut-Rate Hardware; Frank Peri and Sequoia Market, totalling the sum of $1,858.22, were those owing on or about December 29, 1941? You owed those people at that time?
>
> A. Yes.

Q. On one claim, $74.80, of Industrial Indemnity Co., I notice you have the date 11/6 to 12/6/41?

A. Yes.

Q. Then the other claim of the Industrial Indemnity Co. which goes from 12/6/41 to 1/6/42 is in the amount of $59?

A. Yes.

Q. These other claims, State Compansation Ins. Fund $344.30, Blake-Moffit-Towne Paper Co., $74.00, Markus Cut-Rate Hardware, Oakland, $331.00, Frank Peri, $900.00, Sequoia Grocery Market, Redwood City, $75.00. Did you owe those bills on or about December 29, 1941?

A. Yes, sir.

Q. Did you owe these laborers approximately the amounts set out under Schedule A (1): Clarence G. Deals, $47; T. Purcelli, $55.50; H. Carlson, $63; H. Hampton, $51; Don O'Leary, $98; George Leith, $63; T. Cacano, $111; Joe Reginato, $111; Joe Chiri, $120; T. Spoon, $51? Did you owe those amounts at or about December 29, 1941?

A. Yes, I did.

Q. Did you pay these creditors whom I have enumerated?

A. No, I did not have much money. I used to keep that money. I still owe that money since that time, their quitting time, because I did not have enough, so I carry it, see, when I cannot pay any more.

Q. In other words, you paid a little on the current work?

A. Yes.

Q. But not on the past?

A. Yes." (T. 171-172.)

In speaking of the element of "undue advantage" or "greater percentage", it was said in *Palmer Clay Products Co. v. Brown,* 297 U.S. 227, 228, 56 S.Ct. 450, 451, 80 L.Ed. 657:

> "Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10 per cent. within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100 per cent. For where the creditor's claim is $10,000, the payment on account of $1000, and the distribution in bankruptcy of 50 per cent., the creditor to whom the payment on account is made receives $5,500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5,000. A payment which enables the creditor 'to obtain a greater percentage of his debt than any other of such creditors of the same class' is a preference."

Since it appears from figures earlier presented that the appellant H. E. Casey Company received about 70% of its claim and the appellant San Mateo Feed & Fuel Company received about 50% of its claim, it would be idle for anyone to deny that the effect of the transfer was to enable the appellants to obtain a greater percentage of their debts than the other creditors of the same class holding claims in the sum of $1858.22.

(e) The transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent.

In previously quoted finding No. (6) the Referee found that "at the time of the making of said assignment by the bankrupt to said San Mateo Feed and Fuel Co., . . . said San Mateo Feed and Fuel Co. had reasonable cause to believe that said bankrupt was insolvent". (T. 236-237.) Corresponding finding No. (5) respecting the appellant H. E. Casey Company was not challenged. (T. 236.)

The issue of "reasonable cause" was essentially one of fact for the Referee as the trier of fact, including the facts proved and all reasonable inferences that might be drawn therefrom, and as there was substantial evidence to support his findings on the subject they must be accepted as conclusive on the appeal. (*Kaufman v. Tredway,* 105 U.S. 271, 25 S.Ct. 33, 49 L.Ed. 190; *Pyle v. Texas Transport etc. Co.,* 238 U.S. 90, 35 S.Ct. 667, 59 L.Ed. 1215; *Remington on Bankruptcy,* vol. 4-A, sec. 1707.) That the Referee as the trier of fact had broad power to sift the evidence and determine the credibility of the witnesses who appeared before him, is undeniable. (*Quock Ting v. United States,* 140 U.S. 417, 420-1, 11 S.Ct. 733, 734-5, 35 L.Ed. 501, 502.)

The bankrupt gave this testimony:

"Q. Did you sign a document similar to that at any time?

A. I signed a bunch of them similar to that, which was smaller than this, which the bookkeeper from Casey Company came down to the

house and he wants me to sign all these papers, I recall it, to individual general contractors.

Q. Did you have the original of that document at any time?

A. No, I did not.

Q. Did you ever sign the original?

A. I keep one and signed. He kept the other.

Q. Did you sign one?

A. Yes, I did sign all.

Q. Now, whom did you give them to?

A. To the bookkeeper, whoever was in charge of the collections.

Q. Do you know the name of the bookkeeper?

A. I don't recall. I think you got it in the book there.

Q. Do you know who Jules Mednich is?

A. Jules Mednich.

Q. Is that the man you spoke to?

Mr. Mullin. We will stipulate that he was the bookkeeper at the time for H. E. Casey Company.

* * *

Q. The original of this was signed on or about that date (February 18, 1942)?

A. Yes.

Q. Did you have any conversation with this gentleman prior to this date?

A. On that day, no.

Q. Prior to that date, did you have conversations with him in connection with the money you owed H. E. Casey & Company?

A. He used to come and complain the account was too big, I will have to pay this bill. I told him I am broke, I have no money. If I cannot collect, I cannot pay.

Q. You say he used to come, where, to your home?

A. Sometimes he came to my home and could not find me and he looked around on the jobs until he met me, which was mostly 39th Avenue, or Conway and Culligan's any place he could get hold of me.

Q. What was the extent of the conversation? What did you say to him?

A. He say: 'We have to get some money; we cannot go on like this.' I say: 'I cannot help it. I got no money; I am broke.'

Q. And how long prior to February 18, 1942, did this conversation take place? Was it a month before?

A. I would say more than that, and he was talking right along. In fact, there was another bookkeeper before that. I was in bad condition on the payments and he used to go to the general contractor and tell him, 'Don't make any more checks. Whenever you make the check, to make it jointly.' " (T. 67-70.)

"Q. Now, you also testified that the date that assignment was signed, that letter on Conway and Culligan's stationery, that no one from the San Mateo Feed & Fuel Company was there that day?

A. No.

Q. Do you mean to say that you saw and spoke to them in connection with that at any other time?

* * *

A. Yes, the bookkeeper, I think, came down before I signed this. * * *

The Witness. A. Before I signed this, the San Mateo Feed & Fuel came down and found me on the jobs and I signed those assignments for them." (T. 80.)

"Q. How long have you known Moore?

A. I know him since late 1937. * * *

Q. And, do you know when he became connected with San Mateo Feed & Fuel Company?

A. I could not tell.

Q. Approximately?

A. I cannot tell exactly, but I would say around 1940 or late 1939; around there; I could not say exactly." (T. 146.)

"Q. You say in your affidavit that you spoke with Mr. Moore in January of 1942?

A. Well, he came around in 1940 and told me that he had to have some money.

Q. For whom did he tell you he had to have some money?

A. For San Mateo Feed & Fuel Company.

Q. What did you tell him at that time?

A. I tell him I haven't; I am broke; I got no money and unless I collect, I cannot give you another penny.

Q. Tell me, did you speak to him about closing up your operations at that time?

A. Yes.

Q. When was that?

A. It was around January, 1942; it would be January 15th, something like that, you know, I cannot exactly say the date.

Q. When did you actually close your operations? Do you know?

A. Somewhere in February.

A. Of 1942?

A. Yes." (T. 147-148.)

"Q. Did you have any member of the firm of the San Mateo Feed & Fuel Company, or the bookkeeper, call on you about this time in connec-

tion with the obligation due the San Mateo Feed & Fuel?

A. The bookkeeper comes and brings those assignments and makes me sign to give him full authority to collect the money that is coming. I think that is what I signed; that is these I signed, every one of those are individual.

Q. Each and every one has your signature?

A. Yes.

Q. Dated February 17, 1942?

A. That is right. Those are my signatures, yes, sir.

Q. Now, can you tell the Court where these were signed, were you in a house, an office, where, if you recall?

A. I think, I cannot recall, we were down on 39th Avenue on this job, right on the street, or either in his car.

Q. Whose car?

A. The fellow who was collecting.

Mr. Hoffman. What is his name?

Mr. Mullin. Jack DeMonte.

Mr. Margolis. * * * Do you remember Jack DeMonte?

A. I say I know the man when I see him. I told you I don't know the name unless you tell me now.

Q. Does that name refresh your memory?

A. That is right.

Q. You had seen him before that time?

A. Every other day he used to come around on the jobs.

Q. What conversation did you have with him?

A. He came down, he was in charge to collect money for the San Mateo Feed & Fuel, and said unless I say some money he will lose his job. I

say: 'I haven't got no money. When I collect, I will give it to you.'

Q. Did you discuss your financial condition with him generally?

A. I did. I told him I am broke, I got no money in the bank or any place else." (T. 72-73.)

Harold E. Casey, one of the partners of the appellant H. E. Casey Company (T. 23), gave this testimony:

"Q. Where did the suggestion come from for the execution of that assignment, do you know, Mr. Casey? * * *

A. Well, at the time Mr. Scardino was having his trouble, not paying labor bills and material bills, we went to Conway and Culligan and demanded the money or we would have to proceed with our lien rights.

Q. Those troubles you spoke of occurred about the time it was executed?

A. That is right, prior to that.

Q. January?

A. February, I think, is the date.

Q. Along in January when those non-negotiable documents were executed on the form of the American Trust Company?

A. That is right." (T. 47.)

John Damonte, credit manager for San Mateo Feed & Fuel Company until February 28, 1942 (T. 204), testified as follows:

"Q. You say you found he never had money in the bank, at the time of this attachment that you were familiar with?

A. Whether I actually had found he had no money in the bank, I don't know. What I mean to say is, I just didn't feel there was any money in there.

Q. Did you make inquiry?

A. I may have. I am trying to remember on what I am basing the opinion that the bank account was footless. Maybe the gossip was that he had no money. I know what it is. He had his payroll payment and could not meet the payments back in 1941. I knew at that time there was no use worrying about his bank account, attaching it or anything else to get out money.

Q. That condition prevailed all through that period until you ceased employment with the San Mateo Feed & Fuel Company?

A. What condition is that?

Q. That checks were bouncing on his payroll?

A. I don't know about that. I know on that one occasion I thought I had discovered something. I said: 'Now I know where his bank account is. I don't have to worry', and undoubtedly, I found out the checks were bouncing and forgot the bank account.

Q. When was that, January, 1942?

A. No, that was in 1941, the fall of '41. * * *

Q. Did you follow your investigation or examination until after the time these checks bounced? * * *

A. I gave it no more thought. I though after that, it is up to me to keep after him, if the contractors were anywhere good." (T. 210-211.)

"Q. You conveyed this information resulting from the investigation you made to Mr. Ferris?

A. What investigation?

Q. With respect to your attempt to collect?
A. I said there was darned little to collect from." (T. 213.)

Section 60 of the Bankruptcy Act (11 U.S.C.A., sec. 96) does not require that a creditor have actual knowledge that his debtor is insolvent, and subdivision (b) thereof specifically provides that a preference may be avoided if the creditor "or his agent acting with reference thereto" has reasonable cause to believe that the debtor is insolvent. And it is a general rule that "notice of facts which would incite a man of ordinary prudence to an inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose". (*Grandison v. National Bank of Commerce,* 2 Cir., 231 F. 800, 809.)

In view of the circumstances disclosed by the testimony quoted under this subdivision it certainly cannot be said that the findings of the court to the effect that the transfer was made at a time when the appellant creditors had reasonable cause to believe that the debtor was insolvent are "clearly erroneous".

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4. **THE ORDER OF THE DISTRICT COURT SHOULD BE AFFIRMED FOR THE REASON THAT IT PROPERLY AFFIRMED AND ADOPTED THE TURNOVER ORDER OF THE REFEREE.**

It was said in *In re Penfield Distilling Co.,* 6 Cir., 131 F. 2d 694, at page 694:

"Appellant pulls a heavy laboring oar. Findings of fact by a referee in bankruptcy, confirmed by the district judge, will not be set aside, on

appeal, on anything less than a demonstration of plain mistake."

On the record, it is clear that the turnover order of the Referee is sound in law and sound in fact, and appellee therefore respectfully submits that the order of the District Court, affirming and adopting that order, should be affirmed.

Dated, San Francisco,
May 2, 1945.

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